ATTORNEY FOR APPELLANT:

PATRICIA CARESS MCMATH
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JASON STEURY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 05A04-0602-CR-00084
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Bruce C. Bade, Judge
Cause No. 05C01-0312-FA-00054

January 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant-Defendant, Jason Steury, challenges his convictions and sentence, following a jury trial, for seven counts of Child Molesting as a Class A felony,[1] for which he received an aggregate sixty-year sentence. Upon appeal, Steury makes the following four claims: (1) the trial court erred in admitting his statements to police because such statements were involuntary and a product of coercion; (2) the evidence was insufficient to support five of his convictions; (3) the introduction into evidence of acts occurring prior to the time of the charged acts constituted fundamental error; and (4) consecutive sentences were improperly imposed and inappropriate.

We affirm.

The record reveals that on December 16, 2003, C.W., who was twelve at the time, reported to her history teacher that she thought she was pregnant due to her sexual activity with her mother's boyfriend, Steury. At the time, Steury lived with C.W.'s mother, Laura, at 805 West Kickapoo Street and served as the primary caregiver for C.W. and her sister, as well as for Steury's and Laura's twin daughters. Laura was often away from home for work from about five o'clock in the morning until four o'clock in the afternoon, or later, sometimes seven days a week. Such was her schedule on December 14, 2003. According to C.W., at some time in the afternoon of December 14, while Laura was at work, the other children were asleep, and she was lying on the couch at their home, Steury "c[a]me over with a blanket," took her clothes off, and had sexual intercourse with her. Tr. at 93.

[1] Ind. Code § 35-42-4-3 (Burns Code Ed. Repl. 2004).

C.W. also testified that on the morning of December 16, 2003, also at home, she again had sex with Steury. According to C.W., she came downstairs from her upstairs bedroom and went into Steury's bedroom at his request, whereupon he initiated sexual intercourse with her by removing her pajamas and kissing her and then "put[ting] his penis inside [her]," and "mov[ing] up and down." Tr. at 94.

C.W. testified that she and Steury had also engaged in sexual intercourse in November, as well as "almost every month besides when he was in jail." Tr. at 95. According to C.W., this sexual activity began when she was nine years old when she lived at a house on Cherry Street. C.W.'s testimony regarding this first time was that she was in her sister's room when Steury came into the room, pushed her on the bed, took both of their clothes off except their shirts, told her she was "safe," and put his penis in her vagina. Tr. at 96. According to C.W., her sexual activity with Steury was frequent and occurred "too many [times] to count," including more than 100 times per year when she was ages nine, ten, and eleven. Tr. at 95. C.W. indicated that she and Steury would generally engage in this sexual activity in her mother's bed "almost every morning." Tr. at 97. C.W. alleged that it was Steury's routine to call her down from upstairs in the mornings, and when she appeared, to tell her to sit on the bed. According to C.W., Steury did not wear clothes to bed, and the two would then have sexual intercourse. C.W. further testified that this routine was interrupted for approximately two to three months during the 2003 year because Steury was not living at the house during that time.

Laura testified that in October of 2003, "right before [C.W.'s] 13th birthday," she was contacted by Office of Family and Children investigator Michelle Coons regarding

claims by C.W. at school that C.W. had participated in oral sex with Steury. Tr. at 79. According to Laura, she took C.W. "out to the country where nobody else was around" and asked her whether these claims were true, whereupon C.W. answered that they were not true. Tr. at 80. C.W. denied at trial that she had ever made any such claims at school in October. The claims were subsequently deemed to be unsubstantiated. At trial, C.W. testified to having claimed in approximately 2000 or 2001 that Laura had held a knife to her throat. C.W. admitted that her purpose for making this allegation was to be able to live with her father.

Testimony from Coons indicated that in investigating C.W.'s December 16 allegations, she drove C.W. to the police station to be interviewed by Captain Teresa Henderson, and the following day she accompanied C.W. to her house to gather the clothing she had worn on December 16. The parties subsequently stipulated to the laboratory results following tests of C.W.'s clothing.

At approximately 5:45 p.m. on December 16, Captain Henderson contacted then-Detective Matthew Felver to interview Steury about C.W.'s allegations. Steury was arrested for a probation violation and brought to the Blackford County Security Center for an interview. During this interview, Steury signed a standard waiver-of-rights form and subsequently admitted engaging in sexual intercourse with C.W. multiple times.

C.W. was examined by Dr. Neil Stalker on December 17, 2003, who found superficial abrasions and trauma in the fossa navicularis area of her vagina. It was Dr. Stalker's opinion that such trauma was attributable to the insertion of something, though likely not a tampon, into C.W.'s vagina.

Steury was charged on December 17, 2003 with seven counts of child molesting as a Class A felony, and a warrant was issued for his arrest. On March 2, 2005, Steury moved to suppress all statements he made prior to, during, or following his arrest. The court denied his motion. Following a jury trial beginning on March 8, 2005, Steury was convicted on all seven counts. On April 8, 2005, the trial court sentenced him to an aggregate sentence of sixty years.

On May 9, 2005, Steury filed a notice of appeal. Following the filing of the Notice of Completion of Transcript on August 23, 2005, Steury filed a Verified Motion for Extension of Time on October 7, 2005, which our court denied as untimely. On December 6, 2005, our court dismissed Steury's appeal following his failure to make any further filings. On February 15, 2006, Steury filed a motion for permission to file a belated appeal, which our court granted on February 24, 2006.

Upon appeal, Steury claims the following: (1) that State's Exhibit 2 was erroneously admitted into evidence in violation of his constitutional rights; (2) that the evidence was insufficient to support five of his seven convictions; (3) that the admission of testimony regarding uncharged acts occurring prior to the time of the charged acts constituted fundamental error; and (4) the court's imposition of consecutive sentences was erroneous and inappropriate. We address each argument in turn.

Admissibility of the Evidence

Steury's first challenge is to the admission into evidence of his taped statement, State's Exhibit 2, in which he waived his Miranda rights and confessed to having sex with C.W. Steury argues that this statement was obtained through coercion, denying him

due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and further violating his right against self-incrimination under both the Fifth Amendment to the United States Constitution and Article 1, Section 14 of the Indiana Constitution.[2] In making this argument, Steury, who had been arrested for a probation violation prior to making the taped statement, claims he was not adequately informed that the actual reason for the interview was the molestation allegations, not the probation violation, and that his subsequent waiver of his Miranda rights was the product of coercion and therefore involuntary.

When a defendant challenges the admissibility of his confession, the State must prove beyond a reasonable doubt that his confession was given voluntarily. Washington v. State, 808 N.E.2d 617, 622 (Ind. 2004). The voluntariness of a confession is determined from the totality of the circumstances. Id. In turn, the "totality of the circumstances" test focuses on the entire interrogation rather than on any single act by police or condition of the suspect. Id. We review the record for evidence of inducement by way of violence, threats, promises, or other improper influences. Id. The decision whether to admit a confession is within the discretion of the trial judge, and we will not reverse such decision absent an abuse of discretion. Carter v. State, 730 N.E.2d 155, 157 (Ind. 2000). Upon reviewing a challenge to the trial court's decision to admit a confession, we do not reweigh the evidence but instead examine the record for substantial probative evidence of voluntariness. Id.

[2] Steury does not make separate arguments based upon each of the claimed constitutional violations, instead arguing that the relevant inquiry under all three of the constitutional protections is "whether the statement given to police by the defendant was voluntarily given." Appellant's Brief at 5.

In arguing that Steury's statement was not voluntarily given, Steury argues that Detective Felver failed to inform him that he was investigating a sexual abuse claim, thereby misleading him as to the true purpose of the interview. In making this argument, Steury analogizes his case to Hall v. State, 255 Ind. 606, 266 N.E.2d 16 (Ind. 1971) and A.A. v. State, 706 N.E.2d 259 (Ind. Ct. App. 1999), and distinguishes it from Armour v. State, 479 N.E.2d 1294 (Ind. 1985).

In Hall, 255 Ind. at 611, 266 N.E.2d at 19, where a defendant confessed after being told by interrogating officers that his wife would be charged with the crime if he did not confess to it, our Supreme Court determined that, given the officers' threat "encourag[ing]" the defendant to confess, his resulting confession could not be said to be freely and voluntarily given as a matter of law. Similarly, in A.A., 706 N.E.2d at 264, where a juvenile confessed after being told that his confession was necessary if he wanted to be considered to be a credible witness in the State's case against his uncle for molesting him, our court determined that requiring a juvenile to "barter" a confession in one case in exchange for prosecution in another rendered his confession involuntary. In Armour, 479 N.E.2d at 1298-99, in contrast, our Supreme Court determined that a defendant's confession to child neglect was voluntary, in spite of the fact that, when confessing, he was aware only that he was being investigated for battery, not specifically for neglect as well.

While it is clear that certain interrogation techniques in the past have rendered some confessions involuntary, the failure by law enforcement officials to inform a defendant of the subject matter of his interrogation has been specifically held *not* to

render a confession involuntary. Washington, 808 N.E.2d at 621-22; Allen v. State, 686 N.E.2d 760, 773 n.11 (Ind. 1997) (quoting Colorado v. Spring, 479 U.S. 564 (1987) ("'[T]he failure of the law enforcement officials to inform [the defendant] of the subject matter of the interrogation could not affect [the defendant's] decision to waive his Fifth Amendment privilege in a constitutionally significant manner.'")), cert. denied, 525 U.S. 1073 (1999). As Steury's only objection to the voluntariness of his confession stems from the alleged failure by Detective Felver to inform him of the subject matter of the interrogation, and there is no suggestion either by Steury or in the record of violence, threats, promises, or other improper influences, we disagree that the totality of the circumstances demonstrates Steury's confession was involuntary.

Furthermore, in spite of Steury's claims, State's Exhibit 2 does not support his claim that he was uninformed as to the reasons for the interrogation. Although Steury had been arrested on a probation violation and the subject matter of the probation violation was briefly discussed, Detective Felver very clearly shifted the focus of the conversation by referring to "the other investigation," and stating specifically that "[C.W.] is indicating that she and you were having sex," before eliciting any incriminating statements from Steury. State's Exh. 2 at 3-4. Accordingly, we reject Steury's first challenge to his conviction on the basis that the trial court erred in admitting into evidence his confession in State's Exhibit 2 on the basis that it was involuntary.

Sufficiency of the Evidence

Steury's second challenge to his convictions is to the sufficiency of the evidence to support five of his seven convictions, specifically those in Counts III through VII.

Steury claims that the evidence was insufficient to support five of the convictions as charged because the evidence as to when the specific acts actually occurred is too "sparse and vague" to support convictions. Appellant's Brief at 10. It is Steury's argument that there was a fatal variance between the dates listed in the charging informations for Counts III through VII, namely November, October, June, May, and April 2003, and the evidence introduced at trial. Steury acknowledges that he failed to make an objection on this point at trial but contends the fatal variance constitutes fundamental error. Absent fundamental error, Steury's failure to lodge a specific objection at trial waived any material variance issue. Bayes v. State, 779 N.E.2d 77, 80 (Ind. Ct. App. 2002), trans. denied.

To award relief on the basis of a variance between allegations in the charge and the evidence at trial, the variance must be such as to either have misled the defendant in the preparation and maintenance of his defense with resulting harm or prejudice or leave the defendant vulnerable to double jeopardy in a future criminal proceeding covering the same event, facts, and evidence. Winn v. State, 748 N.E.2d 352, 356 (Ind. 2001).

Indiana Code § 35-34-1-2(a)(5) (Burns Code Ed. Repl. 2004) requires that an information "[state] the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense." Under Indiana Code § 35-34-1-2(a)(6), the State must also "[state] the time of the offense as definitely as can be done if time is of the essence of the offense." Where time is not of the essence of the offense, however, it is well-established that "the State is not confined to proving the commission on the date alleged in the affidavit or indictment, but may

prove the commission at any time within the statutory period of limitations." Love v. State, 761 N.E.2d 806, 809 (Ind. 2002) (quotation omitted). Time is not of the essence in the crime of child molesting. See id. In child molestation cases, the exact date is only important in limited circumstances, such as where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies. Id.

There is no allegation that C.W.'s age at the time of the offenses fell at or near the dividing line between classes of felonies, so time was not of the essence in the instant case. The State therefore was not confined to proving the commission of the offenses on the dates alleged in the information, but instead could prove such commissions at any time within the statutory period.[3] See id. Our review of the record demonstrates there was sufficient evidence to prove the allegations in Counts III through VII. With respect to Count III, which alleged that Steury committed child molesting against C.W. in November, C.W. testified at trial that Steury had molested her in November of 2003. Furthermore, with respect to Counts III through VII, alleged to have occurred in November, October, June, May, and April of 2003, it is clear that Steury was being charged with five separate acts of molestation. When asked how many times Steury molested her during the 2003 year, C.W. answered "over a hundred" times and confirmed she was sure he had molested her seven times as alleged. Tr. at 97. She further testified that there was a two-to-three month break during 2003 in which the molestation did not

[3] Steury does not claim that the dates alleged by the State in the charging informations were not within the statutory period. In any event, pursuant to Ind. Code § 35-41-4-2(c) (Burns Code Ed. Repl. 2004), "A prosecution for a Class A felony may be commenced at any time."

occur because Steury was out of the household. We note Steury was not alleged to have molested C.W. at anytime in the three months of July, August, and September of 2003. Further still, as evidenced by State's Exhibit 2, Steury admitted to a sexual relationship with C.W. occurring seven times, beginning sometime approximately after she turned eleven, and lasting until December 16th of 2003. Steury further admitted to his continuing concern on a monthly basis as to whether C.W. was having her period, additional evidence tending to incriminate him for ongoing sexual contact with C.W. on, at the very least, a monthly basis. We therefore conclude that Steury's admissions and C.W.'s testimony are sufficient evidence of Steury's convictions for the multiple acts of molestation occurring in November, October, June, May, and April 2003 as charged. See Hodges v. State, 524 N.E.2d 774, 779 (Ind. 1988) (denying defendant's claim that the charging informations for his child molesting convictions alleged too broad a time range and lacked specificity), cited in Love, 761 N.E.2d at 809.

We further note that Steury does not allege how his defense strategy was compromised by the alleged variance between the charging information and the evidence presented against him at trial. Indeed, considering the incriminatory statements he made in State's Exhibit 2, which served as the basis for the charges against him, he would have been well aware of the State's case against him for purposes of preparing a defense. Further, although he claims the variance subjects him to the risk of future prosecution on the same charges, we find this claim unconvincing, as any review of the record, which includes Steury's confession to seven acts of sexual intercourse with C.W. within the time frame beginning sometime after her eleventh birthday, and ending with the acts

occurring on December 14th and 16th of 2003, would demonstrate Steury has been tried and convicted on those charges. See Buzzard v. State, 712 N.E.2d 547, 551-52 (Ind. Ct. App. 1999), trans. denied, cited in Garner v. State, 754 N.E.2d 984, 991 (Ind. Ct. App. 2001), trans. granted, affirmed in relevant part by Garner v. State, 777 N.E.2d 721, 723 n.4 (Ind. 2002).

There was no fatal variance between the charging informations and the evidence at trial, and there was sufficient evidence to support Steury's convictions.

Fundamental Error

Steury's third claim upon appeal is that C.W.'s testimony at trial regarding uncharged acts of sexual molestation by Steury constituted fundamental error. Steury concedes he did not object to the testimony at trial but argues the admission of the testimony constitutes fundamental error. The fundamental error exception to the waiver rule is an extremely narrow one. Glotzbach v. State, 783 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2003). To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. Id. at 1226. Specifically, the error "'must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.'" Id. (quoting Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987)).

Here, C.W. testified at trial that Steury had sexual intercourse with her a greater number of times, by far, than was charged, beginning when she was nine years old. Steury claims that such testimony was inadmissible under Indiana Rule of Evidence

404(b) because it was relevant only for purposes of showing his history of child molestation and his resulting action in conformity therewith on the present charges.

Regardless of whether the evidence at issue would have been admissible under Rule 404(b) if a proper objection had been made, we are not convinced that C.W.'s testimony that Steury had molested her in the past, beginning when she was nine, constitutes fundamental error. In light of Steury's detailed confession in State's Exhibit 2, where he described his escalating relationship with C.W. as she became increasingly physically developed, including accounts of kissing and fondling between Steury and C.W. before she turned eleven, and sexual intercourse, which Steury referred to as "f*cking," when C.W. turned eleven, as well as Steury's accounts of their giving and receiving oral sex, we do not find C.W.'s relatively benign claim to molestation by Steury over 100 times, even including her fairly basic description of the first time it occurred,[4] was so prejudicial to Steury's rights as to make a fair trial impossible. State's Exh. 2 at 24. We therefore reject Steury's claim of fundamental error based upon evidence introduced regarding his history of molestation of C.W.

Sentencing

Steury's fourth and final challenge, which is to his sentence, claims that the court's imposition of consecutive sentences was not supported by the aggravators and mitigators and further, that it was inappropriate in light of Steury's character and the nature of his offense.

[4] C.W. testified that the first time Steury molested her, when she was nine years old, he pushed her onto a bed, took his clothes off, took her pants off, and put his penis in her vagina.

It is well settled that the trial court must identify at least one aggravator to support consecutive sentences. Shepard v. State, 839 N.E.2d 1268, 1270 (Ind. Ct. App. 2005).

In sentencing Steury the trial court found as aggravators (1) Steury's criminal record, which includes two convictions for battery and one for criminal conversion; (2) that he was on probation at the time some of the offenses were committed; and (3) that he was convicted of multiple counts, specifically seven counts, of child molesting involving the same victim over a one-year period. The court found as a mitigating circumstance that Steury had minor children in need of support. The court determined that the aggravators greatly outweighed the mitigator. The court then imposed thirty-year consecutive sentences on Counts I and II, and thirty-year concurrent sentences on Counts III, IV, V, VI, and VII which were to be served concurrently with the sentences in Counts I and II, for a total aggregate sentence of sixty years.

Steury first argues that the trial court improperly considered the fact that he was convicted of multiple counts of child molestation as an aggravator. Steury is correct that a trial court may not use a factor constituting a material element of an offense as an aggravating circumstance. Henderson v. State, 769 N.E.2d 172, 180 (Ind. 2002); Kien v. State, 782 N.E.2d 398, 411 (Ind. Ct. App. 2003), trans. denied. A trial court may, however, look to the particularized circumstances of a criminal act and determine that the particular manner in which a crime is committed carries aggravating weight. See Henderson, 769 N.E.2d at 180; Kien, 782 N.E.2d at 411. The court specifically stated in its sentencing order that it considered as an aggravator the fact "[t]hat the defendant was convicted of multiple counts of Child Molesting involving the same victim that occurred

over a period of one year." App. at 193. Further, upon finding the aggravators outweighed the mitigators at the sentencing hearing, the court specifically referenced "the way this crime was committed."[5] Tr. at 326. It is apparent that the court was not merely considering the fact of Steury's seven convictions for child molesting as an aggravator in itself, but was factoring into its consideration of those convictions the fact that Steury had engaged in ongoing molestation of the same victim over an entire year, which it clearly perceived to be a particularly egregious form of the offenses. The court was within its discretion to consider the perceived egregious nature of the crimes for purposes of evaluating Steury's offenses and imposing consecutive sentences. Further, even if this aggravator were deemed invalid, the court found two additional aggravators, specifically Steury's criminal history and the fact that he was on probation at the time of some of the offenses, and only one mitigator, the fact that he had dependent children in need of his support. In light of the fact that Steury did not provide support for his children in the first place, as well as the fact that the offenses at issue were perpetrated against a child, the mitigator at issue here does not merit weight sufficient to counterbalance the aggravating weight of Steury's criminal history and continuing failure to comply with the law. As one aggravator may justify consecutive sentences, we reject Steury's argument that the court's consideration of the challenged aggravator was faulty to begin with, or if determined to be invalid, would have in any way tipped the balance against imposition of consecutive sentences. See Shepard, 839 N.E.2d at 1270.

[5] Steury does not raise any Blakely challenge to his sentence.

In contesting his sentence, Steury further claims it is inappropriate in light of his character and the nature of his offenses and requests we revise it pursuant to Indiana Appellate Rule 7(B). Steury cites to Walker v. State, 747 N.E.2d 536, 538 (Ind. 2001), and Kien, 782 N.E.2d at 416, in support of his argument that the court's imposition of consecutive sentences for multiple convictions for child molestation is inappropriate.

In Walker, 747 N.E.2d at 538, our Supreme Court concluded that a defendant's two enhanced forty-year sentences for two convictions for child molestation should run concurrently, not consecutively. In reaching this holding, the Court noted that while the defendant in Walker had committed the crime while on probation and had fled the jurisdiction, warranting an enhanced sentence, the trial court had not found a history of criminal behavior, the victim had suffered no physical injury, and an eighty-year aggregate sentence was therefore manifestly unreasonable. Id.

In Kien, 782 N.E.2d at 416, our court similarly concluded that a defendant's aggregate 120-year sentence consisting of three enhanced forty-year sentences for three counts of child molestation was similarly inappropriate. Due to the fact that two of the acts, which comprised separate convictions, likely took place in close proximity in time, leaving the defendant little—if any—time to reflect upon their heinous nature, we concluded the evidence did not support a ten-year enhancement and consecutive sentences on each conviction. Id. As a remedy, we ordered two of the defendant's three sentences to be served concurrently. Id. at 417.

In the instant case, while Steury received two consecutive thirty-year sentences, he was convicted of seven counts of Class A felony child molesting based upon seven

separate and distinct acts which were not arguably so close in proximity as to deny him the opportunity to reflect upon their heinous nature. Steury, who had a criminal history consisting of three past convictions, and who was on probation at the time of some of the instant offenses, would have had ample time to reflect upon the heinous nature of his acts before committing them again. He even admitted to such reflections in State's Exhibit 2, including his understanding of the consequences of incarceration for such behavior. Yet Steury's acts continued, perpetrated against the same victim, and spanning nine months. The Walker and Kien decisions, therefore, do not persuade us that his sentence is unreasonable. Indeed, Steury exploited his position of authority as C.W.'s mother's live-in boyfriend and babysitter to seduce her eleven-year-old daughter to engage in sexual intercourse with him multiple times over the course of nine months. We are not persuaded that his aggregate sixty-year sentence is inappropriate.

Having determined that Steury's claims upon appeal are without merit, we affirm the decision of the trial court.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.